STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY LAMARR GREEN, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED September 25, 2007
v	No. 274921 Wayne Circuit Court
PATRICIA ANDERSON-GREEN, Defendant/Counterplaintiff-Appellant.	LC No. 04-410587-DM

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order changing the physical custody of the parties' minor children to plaintiff and denying the motion to hold plaintiff in contempt for failing to pay child support. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

On April 8, 2004, plaintiff husband filed a complaint for divorce, alleging that the parties were married on October 7, 1990, in Wayne County, Michigan. There were two minor children, a son and daughter, from the marriage. Although the parties had not reached an agreement regarding the legal custody of the minor children, it was asserted that it was in the children's best interests to award joint legal and physical custody. Plaintiff's complaint also alleged that both parties were gainfully employed and had the means to support themselves during the duration of the case and thereafter. A status quo order was requested because both parties remained in the marital home and all household expenses should be maintained.

On May 12, 2004, defendant filed a countercomplaint for divorce.[1] Defendant asserted that the parties were married on October 7, 1989, and during the marital relationship, the parties had acquired real and personal property. It was alleged that plaintiff had a history of selling assets and using income to buy drugs and alcohol to satisfy his addictions. Consequently,

[1] Although a countercomplaint was filed, for ease of reference, we will utilize the term "plaintiff" to refer to the husband and "defendant" references the wife.

defendant requested an injunction to prevent the disposal of assets because plaintiff had entered rehabilitation on several occasions only to relapse. It was asserted that plaintiff's addictions had financially drained the couple's resources, and the marital home was about to be forfeited because plaintiff failed to pay the land contract. Defendant requested joint legal and sole physical custody of the couple's minor children because of plaintiff's addictions.

On April 7, 2005, plaintiff filed a motion to exclude his medical records from trial. There is no indication that the trial court ruled on this motion. On April 15, 2005, defendant filed an emergency motion to enter a temporary child custody order, child support order, and visitation. In the motion, defendant asserted that she fled the marital home because of escalating physical and verbal abuse by plaintiff, who had a history of alcohol and crack cocaine use that caused him to engage in bizarre and abusive behavior. Because the minor children had been removed from the marital home, defendant sought a child custody order to reflect the change in circumstances. Once again, there is no indication that the trial court ruled on the merits of this motion.

On May 2, 2005, the parties appeared for trial. Plaintiff's counsel advised the court that they were ready to proceed, but defense counsel asked for time to discuss what issues were resolved and which issues needed to be addressed. The trial court proceeded to inquire regarding the various issues, and plaintiff's counsel advised that the parties were "absolutely not in agreement to anything." Plaintiff's counsel asserted that defendant had been arrested for domestic violence and had absconded with the children. To the contrary, defense counsel advised that the police had been called to the marital residence on multiple occasions, and it was expected that the domestic violence charge against defendant would be dismissed based on self-defense. The trial court expressed its concern that the case had been pending for over a year and began to address various issues. Defense counsel advised that the friend of the court recommendation of sole physical custody to defendant should be followed because plaintiff did not work with the children on their homework, did not give the children their medications, and did not participate in church activities. Plaintiff's counsel asserted that the allegations were "fiction" and demanded that the court take testimony. The trial court advised defense counsel that it would be placed in the order that the children would attend church activities when in plaintiff's custody and that a show cause should be filed if plaintiff failed to comply. The trial judge continued to address various issues and in the context of resolving a dispute involving a summer day care program, he stated, "Counsel! Counsel, we're not having a trial." With regard to visitation, the court ruled that plaintiff would have "every other weekend with one day during the week to start off with." Once summer began, the trial court advised the parties that plaintiff would be able to have visitation for two days during the week.

Apparently, the parties did not promptly submit a proposed consent judgment of divorce, and on May 24, 2005, the trial court dismissed the case for "lack of activity" and advised that the parties could petition for reinstatement upon a showing of "good cause." There is no indication that the parties petitioned the trial court for reinstatement. Rather, the next documentation in the lower court record consists of defendant's objections to plaintiff's proposed judgment. There is no transcript in the lower court file resolving the objections to the proposed judgment. On July 21, 2005, a judgment of divorce entered that contained the following provision regarding custody of the minor children:

> IT IS FURTHER ORDERED that the parties shall have joint custody with primary residence to the Defendant Mother of the minor children, ANTHONY

LAMARR GREEN, JR. born June 28, 1996, and ANNA MARIA GREEN, born September 24, 1997, until said minor children attain the age of eighteen (18) or until further order of the Court. It is the intent of the parties that the specific parenting time provision in this judgment results in each party substantially equally co-parenting.

Joint Legal Custody means the parties shall be entitled to equal access to the educational, medical, religious and other pertinent records of the children. The parties shall jointly determine the necessity of elective medical care of a major nature and shall make joint decisions on the religious upbringing of the children. The parties shall each be entitled to be informed of all parent/teacher conferences and all other activities (including sports) and/or school programs in which the children and parents are invited to attend. The parties shall each be entitled to receive copies of the children's report cards, medical records and current photographs. Decisions which affect the day-to-day care of the minor children shall be made by the physical custodian exercising parenting time that day.

With regard to parenting time, the judgment of divorce provided:

IT IS FURTHER ORDERED that the Plaintiff shall have the following parenting time with the minor children, until further Order of the Court:

The Plaintiff shall have the minor children.

1. Every Tuesday overnight (pick up the minor children at school) and return them to school on Wednesday morning; Once the children are out of school he shall have the minor children every Tuesday morning through Thursday morning thereafter until further [order] of [the] court which may continue if the parties agree, if not then back to court.

2. Alternate Friday through Sunday return by 6:00 p.m. (pick up after school);

3. His birthday;

4. Father's day;

5. Any other mutually agreeable days.

The Defendant shall have the minor children:

1. Every Monday overnight;

2. Every Thursday overnight;

3. Alternate Friday, through Sunday's;

4. Her birthday;

5. Mother's day; and

6. Any other mutual agreeable days.

The parties shall divide equally the minor children's school breaks specifically x-mas[,] midwinter[,] easter/spring. The parties shall also each receive two weeks summer vacation either continuous or in two one week intervals with the minor children.

The parties shall alternate holidays, Thanksgiving weekend shall be divided equally.

The parties shall each have the option to spend time with the minor children on the minor children's birthdays.

The Plaintiff when he has the minor children on Wednesday's shall make sure they attend scheduled church activities at new St. Paul Tabernacle Church of God in Christ. …

Although a judgment of divorce entered on July 21, 2005, another judgment of divorce was entered on September 9, 2005, which contained the same provisions regarding physical custody and parenting time.[2] In November 2005, defendant filed a motion to show cause for plaintiff's alleged violation of the parenting time provision of the judgment of divorce and for enforcement of child support obligations. Defendant asserted that plaintiff improperly kept the children for two days although the children were back in school and that he failed to take the children to their religious activities on Wednesdays. The matter was referred to the friend of the court for investigation in December 2005. Although the referee's recommendation is not contained in the lower court record, the trial court entered an order on May 17, 2006, entitling defendant to seven make-up overnights to address half of the Wednesday overnights taken by plaintiff between November 17, 2005, and March 20, 2006.

On May 18, 2006, plaintiff filed a motion to clarify and modify the judgment of divorce's provision governing parenting time. In the motion, plaintiff alleged that the judgment of divorce provided for Tuesdays overnights for the remainder of the 2005 school year. However, plaintiff opined that he was rightfully entitled to Tuesday and Wednesday overnights during the 2005-2006 school year. It was also alleged that the children were frequently tardy for school when in defendant's care. Therefore, it was in the children's best interests to also spend Sunday nights at the home of plaintiff. This new schedule requested by plaintiff would achieve the equal parenting goal stated in the judgment of divorce's provision addressing child custody.

Defendant opposed plaintiff's motion, relying on the report from the Family, Evaluation, Mediation, and Counseling Unit (FEMCU). In the report, it was recommended that defendant

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[2] The September 9, 2005 judgment re-typed previously handwritten additions to the prior judgment.

have primary physical custody of the children with reasonable parenting time granted to plaintiff provided that he abstained from drug use, maintained a sponsor, attended group support meetings, and provided the court with the results of random drug screens. Defendant asserted that, minimally, any hearing on the parenting time should be adjourned until plaintiff presented proof of his participation in group meetings and proof of random drug screens. It was also asserted that plaintiff changed his employment, but did not notify the friend of the court with the change for income withholding purposes. An order compelling the notification was requested. A short time later, defendant sought an order holding plaintiff in contempt for failure to pay child support.

On September 26, 2006, the trial court conducted an evidentiary hearing regarding the request to hold plaintiff in contempt for failing to pay child support. Defendant testified that the child support payments were not current based on a financial report sent to her by the friend of the court. According to the information sent to her, defendant was owed approximately $2500 at the end of July 2006. On September 25, 2006, defendant utilized the automated system of the friend of the court to learn that she was owed approximately $2294.36 in back child and medical support plus fees. On cross-examination, defendant testified that she did not maintain financial records of deposits made during the fall of 2005, a period the witness described as "volatile." The witness admitted that since the show cause motion had been filed, she had received two payments of $1,000 each.

Plaintiff examined the friend of the court records and asserted that it did not accurately reflect all of his child support payments. He testified that he was not under an income withholding order between July 7, 2006, and August 18, 2006. Because his employer did not withhold funds for child support, he sent a check to cover child support. Plaintiff also testified that he sent a check in early September 2006, and presented copies of the checks. However, he also admitted that he had not made payments to the friend of the court since September 8, 2006. Upon questioning by his counsel, plaintiff testified that he made payments before the wage assignment was set up with the friend of the court. He identified checks to cover the period of August 2005 to January 2006 that were sent to the friend of the court or to defendant. Plaintiff alleged that the friend of the court recording system was not current, but he nonetheless continued to make payments. He testified that he notified the friend of the court of his new employer and his transfer closer to home. Further, plaintiff testified that, if he was in arrears in his child support, he could make an additional $100 per month payment to become current. Moreover, he opined that defendant owed him $1874 in childcare expenses and any outstanding child support should be offset by that debt.

Upon the completion of the testimony addressing child support, the trial court began a second evidentiary hearing to address plaintiff's motion for clarification of the divorce judgment regarding parenting time. With regard to this issue, plaintiff testified that he believed that the parenting time provision of the judgment of divorce would allow him to have Tuesday and Wednesday nights with his children once summer began and continuing thereafter which included the time period when the next school year commenced. He stated that his residence was a distance of five houses from the children's elementary school. Plaintiff testified that he woke up, exercised, and made lunches before getting the children up for school at 7:00 a.m. He would prepare them breakfast while they got dressed and made their beds. Then, the children would go to school. Once the children got out of school, they attended a latch key program until

plaintiff or another family member picked them up from school. The children worked on their homework during the after school program. Once the children were home, plaintiff would help them finish their homework, eat dinner, and then participate in outdoor activities such as basketball or bike riding. At night, plaintiff would get the children organized for morning by bathing them and setting out their clothes for the next day. However, on Friday evenings, plaintiff's sister stayed with the children while he volunteered at Maplegrove Recovery Center as a member of Alcoholics Anonymous. Plaintiff testified that he did not miss any church activities that were scheduled for Wednesday evenings when the children were in his custody. Rather, he claimed that scheduling at the church might have been an issue. Plaintiff does not attend the same church as defendant, but takes the children to his church on Sundays when he has parenting time. He attested that he loved his children and differed in his parenting views from defendant. Plaintiff testified that it was important to be orderly and on time, and he was teaching his children those things.

Plaintiff testified that he was permitted to have Tuesday overnights with the children. He was requesting Wednesday overnights also because that would allow the children to arrive at school on Thursday mornings on time. Last year, while in the custody of defendant, the children were tardy to school nineteen times. He acknowledged that defendant did not live near the children's school, but resided in Harper Woods. Plaintiff also requested to have the children remain with him until Monday morning instead of having to return the children to plaintiff on Sundays at 6:00 p.m. On cross-examination, plaintiff refused to compromise and agree to take Sunday overnights in lieu of Wednesday overnights. Although plaintiff acknowledged that he was dyslexic, he opined that it did not impact his ability to help his children with their homework. He testified that he learned what homework was assigned and checked their homework when it was completed. Plaintiff denied the assertion that the children went to school without completing their homework. With regard to the scheduling error involving the church, plaintiff admitted that he told the teacher that the activity should be scheduled on Thursday instead of Wednesday. Plaintiff did not know if his daughter was able to attend this activity that he wanted rescheduled because he had other commitments. He denied that this occurred on more than one occasion. Plaintiff then acknowledged that he "got" his daughter to the activities by taking her himself or having his sister take her. He estimated that, on two occasions, his sister took his daughter to church functions.

As an adverse witness, defendant testified that there were problems with the children's homework that were not reflected in the report cards. For example, defendant received an e-mail from a teacher indicating that there was a problem with a spelling assignment. She acknowledged that the children were late for school on nineteen occasions, but she was unaware that a letter was sent indicating that there was a problem because the letter was not mailed to her residence. Defendant did not testify regarding her parenting style or how active she was involved in the children's lives. Curiously, the trial court never advised defendant that it was contemplating a change in physical custody and did not make independent inquiry of defendant regarding the best interest factors.

Barbara Lee Jones, plaintiff's sister, testified that she began to help plaintiff with childcare in the home after the divorce occurred in September 2005. When the children did not understand their homework, she utilized computer resources or contacted her daughter-in-law who was a teacher for assistance. During the 2005-2006 school year, Jones had an active role in

the after school child care. Jones would pick the children up from the after school program between 5:30 and 6:00 p.m. If the children were doing an activity or playing in the program, she would allow them to finish. If they had an after school activity such as cub scouts, she would take the children where they needed to go. If they had no activities, she would take the children home and stay at the house. Plaintiff arrived home between 6:00 and 6:30 p.m. On Friday evenings, Jones would remain at the home while plaintiff went to his meeting. Jones did not have any other childcare responsibilities on Tuesday or Wednesday evening unless plaintiff's daughter had church activities. She testified that plaintiff had a loving relationship with the children and was trying to raise them in a structured environment by teaching values and morals.

At the conclusion of the testimony, the trial court requested that the parties submit proposed findings of fact and conclusions of law on disc with regard to the contempt motion and motion for clarification of parenting time. However, the trial court never advised the parties that it was contemplating a change in physical custody and did not ask the parties to brief that issue. On November 20, 2006, the trial court issued the following opinion and order:

> This matter is before the Court regarding the issues of custody and visitation. The parties were divorced on September 9, 2005. Under the terms of the judgment of divorce the parties were to "share" legal and physical custody of the minor children, with visitation and overnight arraignments [sic] being left up to the parties. The parties are unable to agree as to their interpretation of the judgment of divorce and are now before the Court requesting clarification of the issue of parenting time. An evidence hearing was conducted, after which the parties were ordered to submit findings of fact and conclusions of law for the Court's consideration.
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> The Court now issues its Opinion and Order regarding parenting time. An ancillary issue in this matter is child support. The Court is hearing this matter de novo; any child support amounts are integral to this Court's ultimate determination as to the amount of time that the children will be spending with each parent as a result of this Court's decision as to parenting time. The Court will also address the issue of arrearage.
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> OPINION AND ORDER OF THE COURT:
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> In the instant case, the judgment of divorce is ambiguous as to parenting time and, as the parties cannot agree, the Court must now put in place permanent parenting time provisions for the best interest of the minor children. MCR 2.612. In making its determination of these issues, the Court conducted an evaluation of the twelve best interest factors specified in MCL 722.23, while taking into account the evidence as presented by the parties. *Lambardo v Lambardo* [sic], 202 Mich App 151 [507 NW2d 788] (1993). The best interest factors mean the sum total of the factors to be considered, evaluated and determined by the Court. However, in evaluating the twelve factors, the Court's decision is not based on which party "scores" the most points. *Lustig v Lustig*, 99 Mich App 716; 299 NW2d 375 (1980). Indeed, the weight to be given any factor is ultimately left to the Court's discretion. *McCain v McCain*, 229 Mich App 123; 580 NW2d 485 (1998).

MCL 722.223 standardizes the criteria to be used in disputed cases. The Michigan Child Custody Act contains a strong policy statement that the best interest of the child must be the Court's controlling guide in disputes such as this. MCL 722.25. The child's interest must be determined by the Court solely in accordance with objective standards. Each of the enumerated factors were determined by the Court as outlined in MCL 722.23. *Overall v Overall*, 203 Mich App 450; 512 NW2d 851 (1994). Despite the requirement that the Court articulate its finding of fact and conclusions of law on the best interest factors, neither the Child Custody Act nor MCR 2.517, which govern findings of fact by the trial Court, require that the Court comment on every matter in evidence, or declare acceptance or rejection of every proposition argued by the parties. *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994).

The best interest factors, governed by MCL 722.23, are as follows:

a. The love, affection, and other emotional ties existing between the parties involved and the child: factor "a" focuses on the emotional bond that already exists between a parent and child. That a parent would like to have a better relationship is not relevant. *Glover v McRipley*, 159 Mich App 130; 406 NW2d 246 (1987). The Court finds that both parties have exhibited to the Court that they love, and have great affection for, the minor children. The evidence suggests, however, that plaintiff has fostered a more affectionate bond with the children through his daily interaction with the children and his level of involvement in extracurricular and school functions. The Court finds, therefore, that this factor favors plaintiff.

b. The capacity and the disposition of the parties to give love affection, guidance, and to continue the education and raising of the child in his or her religion or creed: factor "b" attempts to project the ability of a parent to foster an emotional bond in the future and to evaluate a parent's impact on other issues such as guidance, education, and religious training, is any. *McCain v McCain*, 229 Mich App 123; 580 NW2d 485 (1998). The evidence presented convinces the Court that, due to plaintiff's affirmative and more prolific involvement with the minor children's education, religious training, and extra-curricular activities, and that there is no reasonable likelihood that plaintiff will not continue to guide, educate, and nurture the children in the future, along with testimony that has convinced the Court that defendant is either unwilling or unable to provide the same level of guidance, and educational support, to the extent that plaintiff can provide, exhibited by the fact that the minor children have been tardy to school on at least 20 occasions when defendant has oversight of the children, the Court finds that this factor favors plaintiff.

c. Capacity to provide the child with food, clothing, and medical care or other remedial care, or material needs: the evidence shows that both parties are willing and able to provide for the children. Both parents have the capacity to provide the child with food, clothing, and medical care. The Court, therefore, finds this factor to be equal.

d. The length of the time the child has lived in a stable environment, and the desirability of maintaining continuity: factor "d" addresses the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The evidence establishes that a stable environment has been provided by the plaintiff over a significant length of time. Again, defendant's inability to make sure the children arrive at school on time, when she has physical custody of the children, raises broader concerns as to defendant's ability to maintain a structured and disciplined environment for the best interest of the children. It is apparent to the Court that defendant does not have the capacity to provide the level of continuity as does plaintiff. Conversely, plaintiff resides in the martial home in close proximity to the children's school facilitating easy access to school in a timely manner. The Court, therefore, finds that this factor favors plaintiff.

e. The permanence as a family unit of the existing or proposed custodial home: factor "e" is the permanence , as a family unit, of the existing or proposed custodial home. These factors focus on stability and permanence, not the acceptability of the home or child care arraignments [sic]. *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996). While both parties provide a stable home environment, evidence indicates that plaintiff is the predominant force in establishing a sense of stability and has since provided a home in which the children have, and will continue to, developed [sic] a sense of permanence and discipline. The Court, therefore, finds that this factor favors plaintiff.

f. The moral fitness of the parties involved: factor "f" evaluates the parties' moral fitness only as it relates to how they will function as a parent, and not as to who is the morally superior adult. *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994). There is no evidence to suggest that either parent currently has issues in this category that would effect the best interest of the children. The Court finds that this factor to be neutral.

g. The mental and physical health of the parties: there is no evidence before the Court for it to conclude that either party has any current health issues to preclude their responsibilities in this regard. The Court finds this factor to be neutral.

h. The home, school, and community record of the child: The educational records of the children indicate that they are doing well in school. Evidence suggests, however, that defendant's level of involvement in the education and extracurricular activities of the children falls below that of plaintiff. The Court finds this factor to favor plaintiff.

i. The reasonable preference of the child, if the child is of sufficient age to express preference: testimony presented at the hearing has provided the Court with evidence sufficient to make the Court aware of the children's preference; the Court has taken this evidence into consideration. *Duperon v Duperon*, 175 Mich App 77; 437 NW2d 318 (1989). The Court finds this factor to be neutral.

j. The willingness and ability of the parties to facilitate a close continuing parent-child relationship between the child and the other party, or the child and the parents: there has been no evidence presented to a level which convinces the Court that either party will not facilitate a close relationship with the other parent for the benefit of the minor children. The Court, therefore, finds this factor to be neutral.

k. Domestic violence, regardless of whether the violence was directed against or witnessed by the child: There is no evidence to suggest that domestic violence is currently a part of this controversy. The Court finds this factor to be neutral.

l. Any other factors considered by the court to be relevant to a particular child custody dispute: while not controlling by any means, the Court does note that plaintiff's residence is in close proximity to the children's school; defendant has had problems in the past getting the children to school in a timely manner.

When the parents cannot agree on the essential issue of parenting time, the Court must decide the issue based on the children's best interest and must make specific findings of fact on the record or in writing. MCL 722.26a(5); *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993).

Here, the issue before the Court is parenting time. However, where the children will predominantly reside must now be examined with the best interest of the children being foremost in the Court's decision. The evidence is clear that plaintiff has fostered a affectionate bond with the minor children through his daily interactions, and his involvement in extracurricular, church, and school functions. In addition, evidence establishes that a stable and disciplined psychological environment has been fostered by the plaintiff.

Further, evidence indicates that plaintiff was the predominant force in establishing a sense of stability and has provided a home in which the children have developed a sense of permanence; this is even more evident in light of evidence that defendant has failed, on numerous occasions, to address basic parenting skills such as making sure that the children arrive at school on time.

After careful consideration of the best-interest factors, and the correlative evidence presented at hearing, the Court is convinced that due to plaintiff's past record of his level of commitment to the minor children, that there is no reasonable likelihood that plaintiff will not guide, educate, and nurture the children for their best interests in the future. Evidence further indicates to this Court that defendant is either unwilling or unable to provide the same level of affirmative parental interaction, positive discipline and constructive educational guidance to the extent that plaintiff is able to.

The parties originally agreed to liberal and approximately equal parenting time with the minor children. Unfortunately, the parties are now at odds regarding this essential issue. Circumstances created by the parties' fundamental inability to agree on this issue now requires the Court to intercede and modify

parenting time and home structure strictly construed for the children's best interest, not the parties.

Modification of parenting time is decided under the Child Custody Act. MCL 722.27. The best-interest factors are primary to the Court's determination in modifying parenting time provisions. However, a court need not make specific findings on each best interest factor, but may focus solely on the contested issues. *Olepa v Olepa*, 151 Mich App 690, 702; 391 NW2d 446 (1986). Here, the Court has been persuaded by clear and convincing evidence that the following modification is in the best interest of the minor children. *In re Stevens*, 86 Mich App 258; 273 NW2d 490 (1978).

The Court finds that it is in the best interest of the minor children to establish the following custody and visitation schedule in order to foster a more stable and structured familial environment in which the minor children will ultimately thrive, both educationally and formatively.

Therefore, IT IS ORDERED: that the parties shall continue to share joint legal custody of the minor children.

IT IS FURTHER ORDERED that the primary residence of the minor children shall be with plaintiff, Anthony L. Green, continuing until each of the minor children attains the age of majority or until further order of the Court.

IT IS FURTHER ORDERED: that defendant, Patricia Anderson-Green, is awarded the following parenting time during the school year: every other weekend from Friday at 4:00 p.m. until Monday morning, at which time defendant shall transport the children to school. In the week preceding plaintiff's weekend, defendant, mother, shall have Wednesday after school until Friday morning, when she shall transport the children to school. Both parents shall ensure that the children arrive at school in a timely manner during their respective parenting time. Either parent, failing to adhere to this provision, may be subject to sanctions by the court, including a decrease in parenting time.

IT IS FURTHER ORDERED: that during the summer vacation period, the parties shall alternate weeks of parenting time, beginning with defendant, mother, with the parties exchanging the children on Sunday evenings at 8:00 p.m.; each party shall have two consecutive weeks of summer vacation time and; each party shall provide the other party with a two week advance written notice of his/her intended vacation period. …

The trial court delineated the holiday parenting schedule and then ruled on defendant's motion to hold plaintiff in contempt for failing to meet the child support obligations as follows:

The Court holds that the evidence presented by defendant does not convince the Court that plaintiff is in contempt of this Court's Order regarding child support. Further, as the issue of ongoing child support is fluid by its very nature, and susceptible to change as the Court has seen fit to change the parenting

> time scheme in this instance, the issue of child support and plaintiff's arrearage, if any, is re-referred to the Friend of the Court for an expedited investigation to determine if any monies are owed to defendant in light of the evidence presented and admitted at hearing, and also to determine the amount of child support that may be owed to either party under the revised parenting time schedule as ordered herein.
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> Therefore, IT IS ORDERED: that defendant's motion to show cause regarding contempt and plaintiff's alleged failure to pay child support is hereby DENIED.

Defendant alleges that she was denied due process of law when the trial court was presented with a motion to clarify and expand parenting time, but sua sponte changed the established custodial environment to plaintiff. We agree. A parent's custodial rights warrant due process protection because it is an important interest. *Aichele v Hodge*, 259 Mich App 146, 164; 673 NW2d 452 (2003). Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process is designed to limit government action and requires the application of safeguards in proceedings that affect the rights protected by due process, including life, liberty, and property. *Id*. at 382. Due process is a flexible concept applied to the adjudication of important rights. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The individual situation determines what procedural protections are required. *Id*. Fundamental fairness must be protected in governmental proceedings. Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). Due process minimally must include notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). Although the opportunity to be heard does not require a full trial-like proceeding, it does require a hearing where the parties are apprised of the nature of the proceedings and the relevant evidence to which a response is necessary. *Id*.

A custodial environment is established when, over an appreciable time period, the child naturally looks to the custodial parent for guidance, discipline, the necessities of life, and parental comfort. *Rittershaus v Rittershaus*, 273 Mich App 462, 471; 730 NW2d 262 (2007). In determining the existence of a custodial environment, the court should also consider the age of the child, the physical environment, and the permanency of the relationship between the child and custodian. *Id*. The issue of whether an established custodial environment exists presents a question of fact. *Id*. When the trial court fails to make a finding regarding the existence of an established custodial environment, this Court remands for such a determination unless there is sufficient information in the record for this Court to independently reach the issue through de novo review. *Id*.

When presented with a motion to change custody, the trial court must first determine whether an established custodial environment exists. *Shulick v Richards*, 273 Mich App 320, 329; 729 NW2d 533 (2006). The trial court shall not change the established custodial

environment unless clear and convincing evidence is presented that such a change is in the best interests of the child. *Id*.; see also MCL 722.27(1)(c).

In the present case, plaintiff filed a motion to clarify the parenting time provision of the judgment of divorce and sought to expand his parenting time. Plaintiff did not request a change in custody. Consequently, when the evidentiary hearing was held, defendant was not placed on notice that a change in custody might occur. Indeed, although plaintiff testified that he was a good father who established a structured environment for his children, defendant's testimony was sparse at best. In fact, it comprised only seven pages of the entire transcript. Although the evidentiary hearing was 128 pages in length, seventy pages was devoted to the hearing addressing defendant's request to hold plaintiff in contempt for nonpayment of child support. Moreover, it is questionable why the trial court held an evidentiary hearing regarding the issue of clarifying the divorce judgment's parenting provision. The transcript resolving the divorce petition indicated that the trial court refused to conduct a trial, despite the fact that the parties requested a trial and despite the fact that there were serious issues of financial responsibility, addiction, and domestic violence. Rather, the transcript indicates that the trial court ordered parenting time for plaintiff that included Tuesday overnights during the school year and would include Tuesday and Wednesday overnights *in the summer*. There is no indication in the transcript that when the trial court resolved the parenting schedule, it was allowing Tuesday and Wednesday overnights to continue into the following school year. The written judgment did not comport with the oral ruling, and the trial court did not compare the two to resolve the matter.

Moreover, at the conclusion of the evidentiary hearing, the trial court instructed the parties to submit proposed findings of fact and conclusions of law. At that time, the trial court did not advise the parties that the issues raised at the evidentiary hearing implicated the best interests of the children and that the best interests of the children should be addressed in the pleadings. Review of defendant's submission[3] reveals that it does not address an established custodial environment, whether a change in the custodial environment was warranted, whether the burden of proof for such a change was presented, and whether the best interests factors warranted any change. Furthermore, the trial court never advised defendant that the best interest factors were at issue and did not inquire whether defendant would need to present additional witnesses or expand upon her own sparse testimony. Indeed, defendant's testimony consisted of only seven transcribed pages, and she was not asked by the trial court to delineate the routine and environment that she had established for the children.

Additionally, the trial court's factual findings as set forth in the opinion are questionable at best. For example, the trial court credited plaintiff for the children's success in school. However, plaintiff testified that despite his dyslexia, he worked with the children on their homework. When plaintiff's sister testified, she indicated that she picked the children up from latchkey and worked on the children's homework with them through the use of computer technology or with the aid of a relative who was a teacher. Thus, it was questionable whether plaintiff should be given credit for any success or if his sister was the driving factor behind such

[3] Plaintiff's submission is not contained in the lower court record for our review.

success. More importantly, at the time of the evidentiary hearing, the children still spent the majority of their time with defendant. Thus, even though the children may have been tardy for school while in defendant's care, they nonetheless were successful in school and the majority of their homework would have been completed while in defendant's custody. Under those circumstances, defendant should have been given credit for some of the success in school despite the fact that it was not addressed in her testimony. It was seemingly assumed that because defendant did not testify about her parental involvement, she was simply not involved. However, the nature of the hearing was to clarify the terms of the divorce judgment, and therefore, defendant's testimony reflected the nature of the hearing and that daily routine and involvement testimony was unnecessary. Moreover, to the extent that plaintiff requested additional parenting time, defendant's counsel proposed the additional Sunday overnight in lieu of Wednesday evenings because of the allegation that plaintiff was not attending to the minor daughter's religious obligations on Wednesdays.[4] Thus, defendant was not on notice that she needed to delineate her daily routine and involvement in the children's lives to justify a continuation of the previously ruled custody and parenting settlement that was produced at the behest of the trial court which advised the parties that there would be no trial.

Furthermore, the trial court acknowledged in the opinion that it did not interview the children, but nonetheless knew the children's preference. However, "the minor children of the parties to a custody dispute will often be among the best sources of information for a trial court regarding many of the statutory best interest factors." *Hilliard v Schmidt*, 231 Mich App 316, 320; 586 NW2d 263 (1998). An interview with the minor children would have resolved the issue of who was predominantly responsible for aiding the children in the completion of their homework and addressed other questions of whom they looked to for guidance, love, and support. The failure to interview the children is particularly troubling in light of the absence of any record regarding plaintiff's addiction, recovery, and anger management. The FEMCU report recommended that physical custody be awarded to defendant in light of plaintiff's former addictions and expressed concern that plaintiff was manifesting his former addictions in the form of anger. There was no questioning of plaintiff regarding whether he was experiencing anger management issues while in recovery and how he disciplined the children.

Further, the trial court's opinion does not address the basic premise involving child custody disputes. When presented with a motion to change custody, the trial court must first examine whether an established custodial environment exists. *Shulick, supra*. Then, the trial court shall not change the established custodial environment unless clear and convincing evidence is presented that a change is in the best interests of the children. *Id*. When the trial court fails to make a determination of an established custodial environment, this Court requires a remand unless we can make such a determination based on a de novo review of the record. *Rittershaus, supra*. In light of the fact that defendant's relationship with the children is

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[4] We note that the trial court did not address issues raised by plaintiff's proofs. It did not address whether the success in school was the result of plaintiff's actions or his sister's action. Initially, plaintiff denied that the minor daughter missed any church activities, but then admitted that she missed one due to mismanagement or scheduling on the part of the church. The trial court did not address this change in testimony and whether it had any impact on credibility.

completely omitted from the record below and the fact that defendant was not advised that the trial court was contemplating a change in custody, we hold that defendant was not afforded minimal due process, *Cummings, supra*, and vacate the trial court's opinion and order regarding parenting time and child custody and remand for proceedings consistent with this opinion.

Defendant next alleges that the trial court erred in failing to hold plaintiff in contempt of court for failing to pay child support. We disagree. The trial court's decision regarding a contempt order is reviewed for an abuse of discretion. *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842, 849 (2006). In the present case, there was a dispute regarding whether the records of the friend of the court were current in light of plaintiff's submission of copies of checks. Therefore, we cannot conclude that the trial court abused its discretion in denying the request to hold plaintiff in contempt of court for nonpayment of support.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

I concur in result only.

/s/ Brian K. Zahra